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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 S.D.S. LUMBER CO.,

11 Petitioner,

12 v.

13 KEVIN GREGORY ET AL.,

14 Claimants.

CASE NO. C20-5767 MJP

ORDER GRANTING MOTION TO
COMPEL

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16 The matter before the Court is Petitioner's motion to compel. Having considered the
17 motion and all related papers, (Dkt. Nos. 43, 49, 50, 56, 57, 58), the Court GRANTS the motion
18 to the extent set forth in this Order. Claimants are ORDERED to answer, without objection,
19 Petitioner's Interrogatories 2 and 3 and to produce all responsive documentation to Petitioner's
20 Requests for Production 21 and 22 within 10 days of this Order. (See Dkt. No. 43, Declaration
21 of Matthew C. Crane ("Crane Decl."), Exs. 1 & 2.) The period subject to discovery is five years
22 before the collision at issue in this proceeding to now. The Court also GRANTS Claimants'
23 request for a protective order and ORDERS that the use of all medical- and mental health-related
24 records and information is limited to this proceeding.

BACKGROUND

SDS Lumber Co. commenced this action under the Limitation of Liability Act (“the Act”), 46 U.S.C. §§ 30501–30512, and Supplemental Admiralty and Maritime Claims Rule F, to limit any liability for damages caused by a collision between its tugboat and a recreational boat owned and occupied by Claimants Kevin and Jacob Gregory. (Dkt. No. 1.) Additional background is contained in the Court’s previous orders. (See Dkt. Nos. 29, 60.)

Claimants seek compensatory and punitive damages for physical pain and suffering and emotional distress caused by the collision. (Dkt. No. 57, Declaration of James P. Jacobsen (“Jacobsen Decl.”), Exs. A & B.) Claimants state they are limiting their claims to “garden variety” emotional distress and seek no compensation for physical injury, medical treatment, lost wages, or lost earning capacity. Id. Nevertheless, they have previously demanded Petitioner pay \$2.9 million to settle their claims. (Crane Decl. at 1.) Petitioner moves to compel Claimants to produce medical, psychological, and pharmaceutical information and documents from before and after the incident. (Dkt. No. 49.) Specifically, Petitioner seeks answers to two interrogatories and two requests for production. (See Crane Decl., Exs. 1 & 2; see also Jacobsen Decl., Exs. A & B.)

Petitioner argues such discovery is relevant to determining the cause of any physical pain or emotional distress Claimants experienced and that Claimants have waived whatever privileges apply by putting their physical and mental condition at issue. (Dkt. Nos. 49, 58.) Claimants oppose on several grounds. (Dkt. Nos. 56, 57.) They argue Petitioner’s counsel did not meet and confer. They also argue that the discovery sought is not relevant because (a) they intend to pursue their claims in state court, not this proceeding, and (b) they do not seek damages for physical injury or diagnosable mental-health conditions and will not rely on any such records to

1 prove their claims. They also argue that the discovery is protected by federal or Washington
2 privileges. In the event discovery is granted, they seek a protective order to limit the use of such
3 records and information to this proceeding. Petitioner does not oppose such a protective order.
4 (Dkt. No. 58.)

5 DISCUSSION

6 A. Meet and Confer

7 The Parties have an obligation to meet and confer in good faith to resolve discovery
8 disputes before moving to compel. Fed. R. Civ. P. 37(a)(1). It is undisputed that there were two
9 phone calls between counsel concerning the discovery at issue. (Dkt. No. 50, Declaration of
10 Meliha Jusupovic; Dkt. No. 56 at 2.) Nevertheless, Claimants argue Petitioner did not meet their
11 Rule 37 obligations because the Parties exchanged a proposed stipulation that Claimants contend
12 would have made this motion unnecessary. (Dkt. No. 56 at 2–3; Jacobsen Decl., Ex. C.)
13 However, Claimants rejected material terms of Petitioner’s proposal, which would have limited
14 Claimants’ claims and the evidence relied on to prove them but, in any case, would not have
15 addressed Petitioner’s discovery requests. (See Jacobsen Decl., Ex. C.) Claimants have
16 maintained their position denying discovery and have not proposed any way to close the gap
17 between the two sides. (See id., Exs. A & B.) Petitioner has met its obligations under Rule 37.

18 B. Relevance

19 A party “may obtain discovery regarding any nonprivileged matter that is relevant to any
20 party’s claim or defense and proportional to the needs of the case,” among other considerations.
21 Fed. R. Civ. P. 26(b)(1). Petitioner argues the discovery sought is relevant because Claimants
22 have put their physical and mental health at issue and that they need the discovery to assess
23 whether the injuries alleged were caused by the collision, or are due to other causes, as well as
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1 the value of the claims. (Dkt. No. 49 at 5.) Claimants argue the discovery at issue is not
2 relevant, for two reasons.

3 Claimants first argue that this proceeding will not determine their claims, because they
4 have the right to pursue their claims in state court. (Dkt. No. 56.) Federal courts have exclusive
5 jurisdiction over cases in admiralty or maritime jurisdiction. 28 U.S.C. § 1333(1). That includes
6 determining whether a vessel owner is entitled to limitation of liability. 46 U.S.C. §§ 30501–
7 30512. Claimants do have the right to pursue “all other remedies to which they are otherwise
8 entitled.” 28 U.S.C. § 1333(1). However, that right is subject to Petitioner’s right to seek
9 limitation in federal court. See Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 453 (2001).
10 Once a vessel owner has filed a petition and complied with the procedural requirements of the
11 Act, “all claims and proceedings against the owner related to the matter in question shall cease.”
12 46 U.S.C. § 30507. Under the Act, if a court finds liability but grants limitation, it will apportion
13 losses among claimants. 46 U.S.C. § 30507. None of the exceptions to this procedure have
14 arisen at this stage. See Lewis, 531 U.S. at 454. The Gregorys’ claims are part of this
15 proceeding and subject to discovery.

16 Second, Claimants argue that the discovery is not relevant because they seek only
17 damages for “garden variety” emotional distress and not for physical injury or diagnosable
18 mental illness. (Dkt. No. 56 at 3.) Damages totaling \$2.9 million are not “garden variety.” See,
19 e.g., Lore v. City of Syracuse, 670 F.3d 127, 177–80 (2d Cir. 2012) (upholding award of
20 \$150,000).

21 **C. Privilege**

22 While most of the briefing by the Parties on privilege is on federal law, Claimants also
23 argue Washington law should govern because they intend to proceed on their claims in state
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1 court. Whatever the merits of this argument, e.g., Hartford Fire Ins. Co. v. Garvey, 109 F.R.D.
2 323, 325 (N.D. Cal. 1985), the result is the same either way: they have waived whatever
3 privileges apply.

4 Washington protects psychotherapist-patient and physician-patient communications from
5 compelled disclosure. Wash. Rev. Code § 5.60.060(4) (physicians); Wash. Rev. Code
6 § 18.83.110 (psychologists). However, “[n]inety days after filing an action for personal injuries
7 or wrongful death, the claimant shall be deemed to waive the physician-patient privilege.” Wash.
8 Rev. Code § 5.60.060(4)(b). Claimants seek damages for “physical pain and suffering,” so they
9 have waived the privilege. (Jacobsen Decl., Exs. A & B.) Washington courts have applied this
10 statute to find the psychologist-patient privilege similarly waived in the context of emotional
11 distress claims. Lodis v. Corbis Holdings, Inc., 172 Wash.App. 835, 855 (2013).

12 Federal law protects confidential communications between a licensed psychotherapist
13 and patient during the course of diagnosis and treatment. Jaffee v. Redmond, 518 U.S. 1, 15
14 (1996). As an initial matter, even assuming there is no waiver, the privilege does not apply to
15 some of the records and information sought. It applies only to communications that occurred “in
16 the course of diagnosis or treatment.” Id. at 15. Therefore, it does even apply to parts of
17 Petitioner’s demands. (See Crane Decl., Exs. 1 & 2).

18 Where the psychotherapist-patient privilege does apply, it is waived when a plaintiff puts
19 their “emotional condition at issue.” Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir.
20 1994). The Ninth Circuit has not specified exactly what constitutes placing one’s emotional
21 condition “at issue,” so district courts have taken different approaches with respect to waiver
22 when it comes to “garden variety” emotional distress. E.g., EEOC v. Cheesecake Factory, Inc.,
23 C16-1942-JLR, 2017 WL 3887460, at *4 (W.D. Wash. 2017). However, the Court need not
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1 discuss these approaches in detail, as it is clear that, by seeking damages of \$2.9 million,
2 Claimants are not alleging “garden variety” emotional distress. See Lore v. City of Syracuse,
3 670 F.3d 127, 177–80 (2d Cir. 2012). Therefore, they have put their emotional condition “at
4 issue” in this proceeding and have waived the privilege.

5 There is no physician-patient privilege under federal law. The Ninth Circuit has
6 recognized a constitutional right to the privacy of medical information in certain contexts.
7 Seaton v. Mayberg, 610 F.3d 530, 536–37 (9th Cir. 2010); United States v. Chase, 340 F.3d 978,
8 985 (9th Cir. 2003). The Ninth Circuit has not set out clear rules for waiver in the context of the
9 discovery at issue here. Even assuming it would apply, other district courts have held the right is
10 waived when a plaintiff puts their physical health “at issue.” See EEOC v. Cheesecake Factory,
11 Inc., C16-1942-JLR, 2017 WL 3887460, at *7 (W.D. Wash. 2017) (collecting cases). Claimants
12 have put their physical condition “at issue” because they seek damages for “physical pain and
13 suffering.” (Jacobsen Decl., Exs. A & B.) Therefore, they have waived the privilege.

14 Having found that the discovery at issue is relevant and proportional to the needs of the
15 case and that Claimants have waived whatever privileges they have, the Court ORDERS
16 Claimants to comply with the discovery requests as stated above. Nevertheless, finding good
17 cause, the Court GRANTS Claimants’ request for a protective order limiting the use of any
18 medical- or mental health-related information or records to this proceeding.

19 The clerk is ordered to provide copies of this order to all counsel.

20 Dated July 12, 2021.

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23 Marsha J. Pechman
24 United States Senior District Judge